remedy. The remedy he pursued was extra-legal or extra-judicial. Once the final decision of Government is given, a representation is merely an appeal for mercy or indulgence, but it is not pursuing a remedy which the law gave to the petitioner. But even assuming that that time should be condoned, the petitioners did not make a representation to Government till 15.2.1953, a month after the order was passed, and even when they received the final decision of Government on 3.4.1953, they waited a month more before this petition was presented. Therefore, in our opinion, there has been such a delay in the presentation of this petition as would disentitle the petitioner to any relief at our hands".

That case is not binding on our courts but it is of great weight and I shall respectfully adopt it as my own. It follows therefore that counsel's contention cannot hold water. The only delay that the court will excuse is the delay involved in the pursuit of a legal remedy open to the petitioner, and no other. Secondly, it was contended that the applicant's relationship with the Government is not one of contract and therefore the letter dated 4th August, 1964, purporting to terminate his service by the payment of one month's salary in lieu of notice is an error in law on the face of the record. In my view, a Government, like any other employer, is not fettered to enter into special contracts of employment with temporary employees. I am encouraged in that view by a passage in the persuasive judgment of the Supreme Court of India in *Satish Chandra Anand* v. *The Union of India*:— [2]

"But of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who chose to accept those terms and enter into the contract are bound by them, even as the State is bound. When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above, as free to make special contracts of service with temporary employees, engaged in works of a temporary nature, as any other employer"

In the light of the facts presented by the applicant, the offer made by the Public Services Commission was in respect of temporary employment and clause 2(d) specifically states that during the rest of the period of employment, that is to say after the first year of employment, the appropriate notice required by both parties would be three months' or one month's salary in lieu thereof plus cost of living allowance. The applicant accepted those terms and entered into a contract with the Government. He was thus bound by those terms in the same way as the Government was bound. In the circumstances I see no escape from the conclusion that the present case is sufficiently analogous to a contractual relationship. Thirdly, it was contended that by virtue of article 132(2A) of the Federal Constitution the applicant holds office during the pleasure of the Yang di-Pertuan Agong and therefore he cannot be dismissed unless he was given an reasonable opportunity of being heard: see article 135(2) of the Federal Constitution. Without deciding whether the applicant holds office during pleasure, I am clearly of the opinion that article 135(2) does not apply. The applicant was never dismissed from service. Dismissal pre-supposes some disciplinary proceeding against him whereby he is found guilty of indiscipline and misconduct under the Public Officers (Conduct and Discipline) Regulations, 1956. That is not the present position here. This is purely a case of a contract being terminated under one of its clauses. To say that the applicant was dismissed would be to use that word in quite a different sense from any in which, as far as I can see, it has hitherto been used.

In the existing state of facts I am satisfied that a strong case has not been established to warrant this court in enlarging the time in respect of this application. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Mahendra & Hee.*

HO KIONG CHAN v. PATIPET

[F.C. (Tan Ah Tah Ag.C.J. (Singapore), Buttrose and Chua JJ.) November 15, 1965]

[Singapore — Federal Court Civil Appeal No. Y2 of 1965]

Damages — Personal injury — Evidence of negligence.

Negligence — Duty of driver of motor vehicle — High standard of care required — Duty to keep proper look out.

The plaintiff, respondent in this appeal, was a boy aged eight; he claimed damages for personal injuries sustained by him in consequence of being knocked down by a motor car driven by the defendant, appellant herein. The learned trial judge found the defendant's failure to keep a proper look out was the main cause of the accident and awarded damages at $2,000 and costs. On appeal the Federal Court was of the opinion that the learned trial judge in arriving at his decision, drew inferences and assumed facts not justified by the evidence, and

Held: (1) there was no negligence established on the part of the defendant and infant plaintiff was solely responsible for the accident;

(2) the appeal must be allowed with costs.

Per Choor Singh J. in the court below: "There is a very strong duty on the part of a driver to keep a good look out while driving. The power of control is illusory if the driver is not watching the road. The sharpness of the look out, required depends upon the circumstances existing at the time.... A driver should always anticipate the possible presence of others on the road and should always be able to stop within the range of his permitted vision.... It must be borne in mind that the duty of care incumbent upon the driver is very high because he is in charge of a vehicle capable of doing great damage, and he is usually able to observe pedestrians crossing his path and to warn them if they appear to be unaware of his approach."

Cases referred to:—

(1) *Page* v. *Richards & Draper*, unreported, cited at [1933] 2 K.B. 453, 457.

(2) *Tart* v. *Chitty & Co.* [1933] 2 K.B. 453.

(3) *London Passenger Transport Board* v. *Upson* [1949] A.C. 155.

(4) *Daly* v. *Liverpool Corporation* [1939] 2 All E.R. 142.

FEDERAL COURT.

D. G. Ironside for the appellant.

Edwin J. D'Souza for the respondent.

In the court below the following judgment was delivered on September 21, 1965:

Choor Singh J.: The plaintiff, an infant, brought this action by his next friend Gopal Krishnan, who is his lawful father, for damages in respect of personal injuries sustained by him in consequence of his having been knocked down by a motor-car driven by the defendant.

The accident occurred on Havelock Road, Singapore, on the 20th May 1964 at about 6.30 p.m. when the defendant was driving motor-car No. SK. 9272 along that road in the direction of Alexandra Road from the direction of Havelock Road police station.

The plaintiff who was eight years old at the time of the accident gave the following version of the accident: On the day of the accident, he and his brother Pandian, aged 10 years, left their house at about 6.30 p.m. to go and play at a playground. To reach the playground they had to cross Havelock Road. Both of them walked to Havelock Road, the plaintiff walking ahead of his brother. When the plaintiff reached Havelock Road he stood on the left hand side of the road as one faces Alexandra Road, waiting to cross the road. As he stood there, one or two feet from the edge of the road, waiting to cross the road, he saw a car coming from his right. It was travelling in a zig zag manner and it came and hit him as he stood there.

Plaintiff's version was corroborated by his brother Pandian who testified that he saw the car travelling in a zig zag manner and coming towards his brother who was standing one or two feet from the edge of the road. He reached forward and grabbed his brother's shirt in order to pull him back but it was too late. His brother was hit by the car which failed to stop after the accident.

One Yacob bin Abdullah claimed to have seen the accident. His evidence was that he had seen the two boys standing about 20 feet away from him waiting to cross the road. They were standing on a plank placed across the drain. The plaintiff was standing at the edge of the plank. He saw the defendant's car coming in a zig zag manner. He saw the car hit the plaintiff who was flung off the road and fell on the embankment at the side of the road. The car failed to stop although he shouted "mai chow" (don't run). He took down the car's number.

The defendant's version was as follows. At the scene of the accident there were vehicles parked on both sides of the road. He was driving at 20 or 25 miles per hour. The plaintiff ran out from behind a vehicle parked on the left hand side of the road and ran across the path of his car when it was only four feet away from him. He stepped on his brakes and swung the car to the right but was unable to avoid hitting the plaintiff. The car pulled up in about 20 feet and he looked around and saw the plaintiff lying on the road about four or five feet from the left edge of the road. Because he heard some persons shouting, he drove away and made a report at Havelock Road police station. The defendant stated that the road at the scene of the accident is 20 feet wide and that he had measured it two days after the accident.

The plaintiff, his brother Pandian and the witness Yacob had all testified that there were no cars parked on the left side of the road at the scene of the accident, and further, that there were double white lines in the centre of the road and consequently no cars could be parked there on either side of the road. The defendant maintained that the accident occurred at a spot beyond the double white lines and that on that part of the road there were cars parked on both sides of the road. Unfortunately, for some unknown reason, the police never investigated this accident and consequently there was not available to the court the police sketch plan of the scene of the accident which they usually prepare, after taking road measurements and observing the position of the vehicle or vehicles involved in the accident and of any other features noticed on the road. But it can be demonstrated from the defendant's own evidence that what he stated could not be true. If the road is only 20 feet wide and there were cars parked on both sides of the road, occupying five or six feet on each side of the roadway, that would have left only 8 to 10 feet of the roadway free for two streams of traffic to pass, which is something quite impossible. The defendant was clearly not speaking the truth. Either there were no vehicles parked on this portion of the road or the road was very much more wider than 20 feet.

On the issue, as to whether or not there were cars parked on the left hand side of the road, I accepted the evidence of the plaintiff and that of his witnesses and held that the accident occurred on that part of the road where there are double white lines in the centre of the road; that there were no cars parked on either side of that stretch of the road at the time of the accident and that consequently the plaintiff could not have run out from behind or from in front of a stationary car parked on the left side of the road.

I found it difficult to accept the defendant's

version of the accident. He stated that he was travelling about one foot from the line of parked cars on his left, at a speed of 20 to 25 miles per hour and that the plaintiff ran out from behind a parked car into the path of his car when it was only four feet from the plaintiff. In those circumstances, one would expect the defendant's car to hit the plaintiff squarely and with considerable force. The plaintiff would have been either run over by the defendant's car or flung away with such force that he would have received much more serious injuries than he did. The only injury that the plaintiff received was a fracture of the lower part of his right leg. There were no injuries at all on any other part of the body. In my opinion the defendant was not speaking the truth and the accident did not occur in the manner alleged by him.

I did not accept the evidence of Yacob that the plaintiff was hit by the car when he was standing at the edge of the plank placed across the drain or that the plaintiff was flung by the impact on to the embankment on the left side of the road. Nor did I accept the evidence of the plaintiff that he was standing motionless, one or two feet from the edge of the road, when the car hit him.

The evidence shows that the accident occurred on a very narrow road where there is a right hand bend or curve in the road. The defendant was travelling too close to the left edge of the road and negotiated the curve at a speed which was excessive in the circumstances. Furthermore, he was not in proper control of his car which accounted for the witnesses describing the course of his vehicle as "zig zag". Nor was he keeping a proper look out. In my opinion, the plaintiff was knocked down as soon as he attempted to cross the road, i.e. as soon as he stepped forward. This is borne out by the fact that the only injury he received was to the lower part of his right leg. The defendant's admission that after the impact he saw the plaintiff lying on the road four or five feet from the left edge of the road is further support for this inference.

The defendant's failure to keep a proper look out was, in my opinion, the main cause of the accident. It has been stated time and again that there is a very strong duty on the part of a driver to keep a good look out while driving. The power of control is illusory if the driver is not watching the road. The sharpness of the look out required depends upon the circumstances existing at the time. In the present case the defendant was driving along a very narrow road in a built-up area and negotiating a right hand bend or curve in the road at the time of the accident. Had he used ordinary care and kept a proper look out he would have seen the plaintiff and his brother standing on the left edge of the road, waiting to cross the road, and he should have kept his course well away from them. These two small boys standing on the left edge of the road would have been visible to him from a fairly good distance because the bend in the road is a right hand bend. A driver should always anticipate the possible presence of others on the road and should always be able to stop within the range of his permitted vision. In *Page* v. *Richards & Draper*,[1] Rowlatt J. said:

> "It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be things or people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course, at any time to avoid anything he sees, after he has seen it. If there is any difficulty in the way of his seeing, like a fog, for instance, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the driver, the defendant, is in this dilemma, either he was not keeping a sufficient look out, or, if he was keeping the best look out possible, then he was going too fast for the look out that could be kept."

The above passage was cited and approved in *Tart* v. *Chitty & Co.*[2] at page 457.

It is true that the plaintiff was crossing the road when he was knocked down. But it must be borne in mind that the duty of care incumbent upon the driver is very high because he is in charge of a vehicle capable of doing great damage, and he is usually able to observe pedestrians crossing his path and to warn them if they appear to be unaware of his approach. As was observed by Lord Porter in *London Passenger Transport Board* v. *Upson*,[3] "a driver must, of course, keep a proper look out even for negligent pedestrians". And in the same case Lord Uthwatt said:

> "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take."

There is further support for the view that the standard of care required of the driver of a motor vehicle is very high. In *Daly* v. *Liverpool Corporation*,[4] Stable J. said at page 444:

> "My view is that the sooner it is recognised as being the law that a person who drives a motor vehicle under modern conditions is in precisely the same position as, for instance, that of a surgeon or a person who undertakes to perform an extremely difficult task, involving extremely dangerous consequences for other persons, the better. The standard of care and skill which the law must demand from the driver of a motor car today is a very high one indeed. A motor car has become a lethal weapon."

On the evidence before me I was satisfied that the defendant was negligent in that he failed to keep a proper look out, drove dangerously near to the left edge of the road, at a speed which was excessive in the circumstances, and failed to drive along a safe and proper course.

I considered the question of contributory

negligence on the part of the plaintiff. The plaintiff was certainly negligent in the sense that he did not look to his right before stepping forth to cross the road. He could not have failed to see the defendant's car had he looked in that direction. And the question that I had to consider was, whether or not, that negligence contributed to the accident. In my opinion it did not. It is true that the plaintiff stepped forward and came on to the path of the defendant's car but that was a path which the defendant should not have followed. In my opinion had the defendant been travelling on the proper part of the road he would have passed clear of the plaintiff. The impact took place close to the left edge of the road. And it took place there because the defendant was travelling too close to the left edge of the road. In my opinion, the plaintiff had not gone sufficiently far into the road, to be in any way responsible for the accident. If a pedestrian, in order to cross a road, negligently moves forward across the road and reaches that part of the road where fast moving traffic normally travels, resulting in a collision with a vehicle travelling along its proper path, the question of contributory negligence on the part of the pedestrian would certainly arise. But that is not, in my opinion, what happened in this case. To put it bluntly, it was the defendant who came to the plaintiff and knocked him down. It was not the case of the plaintiff going to the defendant's proper path and getting himself knocked down. I therefore held that there was no contributory negligence on the part of the plaintiff in this case.

In my opinion the accident was caused solely by the negligence of the defendant. Had he been driving on the proper part of the road at the proper speed and had he kept a proper look out he would have been able to avoid the consequences of the infant plaintiff's negligence. In my view the defendant's negligence was the final and direct cause of the accident. I therefore held that the plaintiff succeeded in his claim. The parties had, at the commencement of the trial, agreed that $2,000 was a fair sum to be awarded as damages, subject to my approval. I considered this sum fair and just, having regard to the injury sustained by the plaintiff. Accordingly judgment was entered for the plaintiff against the defendant in the sum of $2,000 and costs as taxed.

The defendant appealed to the Federal Court. After hearing arguments the Federal Court delivered the following judgment:

Buttrose J. (delivering oral judgment): These proceedings arose out of an accident which occurred in Havelock Road on the 20th of May 1964 at about 6.30 p.m. between the plaintiff, a boy of 8 years old, and the defendant who was driving his motor car.

The plaintiff's case was that he and his 10-year old brother had left their house at about half past six to go and play in a playground. In order to do this they had to cross Havelock Road. On reaching Havelock Road, the plaintiff stood on the side of the road waiting to cross. His evidence was that he saw a car approaching on his right in what he described as a zig-zag manner which hit him as he stood there and knocked him down.

His 10-year old brother also said that the plaintiff was standing still at the edge of the road and was knocked down by a car coming in what he too described as a zig-zag manner.

A third witness, Yacob bin Abdullah, who said he was at the scene and saw the plaintiff standing on a plank across the drain by the side of the road. He too said that he saw this car coming in a zig-zag manner which hit the plaintiff who was flung off the road. The remarkable thing regarding his evidence was that he said he saw these two boys for a quarter of an hour waiting by the side of the road; that he then saw this motor car approaching he said in a zig-zag manner for some 3 minutes and in the very next breath he said he saw it coming in a zig-zag manner for some 50 to 60 feet. He did not appear to me to be a witness on whose evidence any real reliance could be placed.

The defendant's case was that he was travelling at some 20 to 25 miles per hour along Havelock Road when the plaintiff infant suddenly ran out from behind a parked vehicle right across the path of his car when it was almost on him. He immediately applied his brakes and swerved the car to the right but was unable to avoid hitting the plaintiff. In the result, the learned trial judge found that the accident was caused solely by the negligence of the defendant and gave judgment for the plaintiff for $2,000 being the agreed damages and costs. From that decision the defendant now appeals.

With respect to the learned trial judge he has, in my view, in arriving at his decision, drawn inferences and assumed facts not justified by the evidence. There was in my own opinion insufficient evidence, or no satisfactory evidence, to support the plaintiff's contention that the defendant's car was on a zig-zag course. The learned trial judge found as a fact that the plaintiff did not look to the right before stepping on to the road and therefore never saw the car at all; consequently he could not have seen it coming in a zig-zag manner as he swore he did. His brother never mentioned a word about the car approaching on a zig-zag course when he ran back to his house immediately after the accident to tell his father what had happened. In my view, that is one thing that he must surely have done if it was so.

The father's report to the police was that his son, Pandian, had told him that the plaintiff had been knocked down when he was crossing the road from the left to the right hand side of Havelock Road; not, be it noted, while he was standing still by the side of the road. Yacob's evidence on this subject of zig-zagging is, in my view, unworthy of belief.

The reasons given by the learned trial judge for finding it difficult to accept the defendant's version are so, it seems to me, not justified by the evidence. His finding that the defendant was not telling the truth was based, in my judgment, on erroneous inferences and an incorrect appreciation of the facts.

There was no evidence to support the learned trial judge's finding that the plaintiff was knocked down as soon as he attempted to cross the road, that is as soon as he stepped forward. The reasons he gave, namely that the only injury was to the lower part of the plaintiff's right leg cannot possibly, so it seems to me, have any bearing as to where on the road the accident occurred. Furthermore, the other reason which he gave, namely, that the defendant's evidence was that after travelling some 20 feet or so he stopped his car and turned round to see what had happened and saw the plaintiff lying some 4 to 5 feet away from the edge of the road is, if anything, inconsistent with the plaintiff being struck just as he stepped on to the road. Furthermore, the evidence of the defendant was wholly consistent with his report made to the police but a few moments after the accident.

The learned trial judge's finding as to there being two lines of closely parked cars on either side of the road is again in my view not supported by the evidence.

Finally, the probabilities of the matter support the defendant's case.

After a close examination of the record and having had the benefit of the argument of counsel, I have arrived at the clear conclusion that there was no negligence established on the part of the defendant and that the infant plaintiff was solely responsible for this accident and was unhappily the author of his own misfortune.

In my judgment the appeal must be allowed with costs here and in the court below. The deposit will be paid out to the appellant's solicitor.

Tan Ah Tah Ag.C.J.: I concur.

Chua J.: I concur.

Solicitors: *Ironside & de Souza; Edwin D'Souza & Co.*

ROBERTS alias KAMARULZAMAN v. UMMI KALTHOM

[O.C.J. (Raja Azlan Shah J.) November 19 and 29, 1965]

[K.L. — Civil Suit No. 760 of 1964]

Muslim Law — Jointly acquired property — Harta sapencharian — Division on divorce — Property registered in name of wife — Whether a gift.

Malay customary law — Harta sapencharian — Presumption — Division on divorce.

Harta sapencharian is a matter of Malay *'adat* and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime; this rule of law is local law which the court must take judicial notice and it is the duty of the court to propound it. Once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts a presumption arises that it is *harta sapencharian.* The presumption is rebuttable by evidence such as that the property was acquired by the sole efforts or resources of the husband or by the evidence that it was a gift made to the wife. With regard to the division of the *harta sapencharian* generally throughout the States of Malaya a divorced spouse is entitled to a share. The share of a Perak woman is fixed at one-third following the State Council Minute of 1907. In the other States the general trend is a half-share depending on the particular circumstances.

The question for determination in this case is whether a Muslim divorced husband can claim a half share as *harta sapencharian* of immovable property jointly acquired by both spouses during the coverture of their marriage but registered in the name of the wife.

The plaintiff, who had divorced the defendant, claimed a half share in a home at Setapak, Kuala Lumpur, which had been purchased during the marriage for the sum of $50,000, out of which the plaintiff raised $40,000 while the defendant raised $10,000. The property was registered in the name of the defendant. The defendant contended that the plaintiff had made a gift of the property to her.

Held: (1) the property was acquired by the joint resources of the parties and was therefore *harta sapencharian* and on the evidence the defendant had failed to establish the unequivocal manifestation by the plaintiff of an intention to make a gift of the property to her;

(2) a Muslim divorced husband can claim a half share as *harta sapencharian* of immovable property jointly acquired by both spouses during the coverture of the marriage and the fact that the land was registered in the name of the wife was no bar to his claim as the provisions of the Land Code with regard to indefeasibility of title of registered land did not affect matters relating to *harta sapencharian;*

(3) in this case the plaintiff was entitled to a share in the property and the court was prepared to award an equal share to each of the parties if they agreed.

Cases referred to:—

(1) *Hujah Lijah binte Jamal* v. *Fatimah binte Mat Diah* [1950] M.L.J. 63.

(2) *Teh Rasim* v. *Neman* (Perak Supreme Court Suit No. 232 of 1919) (1937), 15/1 J.M.B.R.A.S. 18.

(3) *Wan Mahatan* v. *Haji Abdul Samat* (Ipoh Civil Appeal No. 27 of 1925) (1937), 15/1 J.M.B.R.A.S. 25.

(4) *Re Elang, Re Kulop Degor* and *Lebar* v. *Niat* (1937), 15/1 J.M.B.R.A.S. 48.